

EB 06-53

ORIGINAL

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

RECEIVED

In the Matter of)
)
ARKANSAS CABLE)
TELECOMMUNICATIONS ASSOCIATION;)
COMCAST OF ARKANSAS, INC.; BUFORD)
COMMUNICATIONS I, L.P. d/b/a ALLIANCE)
COMMUNICATIONS NETWORK; WEHCO)
VIDEO, INC.; and TCA CABLE PARTNERS)
d/b/a COX COMMUNICATIONS,)

JUN 13 2005

Chief, MDRD
Enforcement Bureau

File No. EB-05-MD-004

Complainants

RECEIVED RECEIVED - FCC

v.

MAR - 3 2006 JUN 10 2005

ENTERGY ARKANSAS, INC.

Federal Communications Commission
Office of the Secretary
Bureau / Office

Respondent.

**To: Enforcement Bureau
Market Disputes Resolution Division**

REPLY

ARKANSAS CABLE TELECOMMUNICATIONS
ASSOCIATION; COMCAST OF ARKANSAS, INC.;
BUFORD COMMUNICATIONS I, L.P. D/B/A
ALLIANCE COMMUNICATIONS NETWORK;
WEHCO VIDEO, INC.; TCA CABLE PARTNERS
D/BA COX COMMUNICATIONS

J. D. Thomas
Genevieve D. Sapir
HOGAN & HARTSON LLP
Columbia Square
555 13th Street, NW
Washington, D.C. 20004
Tel. 202.637.5600
Fax 202.637.5910

June 10, 2005

Its Attorneys

SUMMARY

In this Reply, Complainants the Arkansas Cable Telecommunications Association, Comcast of Arkansas, Inc., Buford Communications I, L.P. d/b/a/ Alliance Communications Network; WEHCO Video, Inc and TCA Cable Partners d/b/a Cox Communications show that the justifications that Entergy Arkansas, Inc. ("EAI" or Entergy") offers in defense of its unjust and unreasonable conduct, far from disproving that Complainants are not entitled to all the relief requested in the Complaint, provides even greater support for Complainants' claims.

EAI's Response, consists of a nearly 300-page main "brief" and thousands of pages of "supporting" documents contained in four large boxes. The purpose of this submission is to tax Complainants'—and the Commission's—resources. EAI seeks to obscure its unlawful behavior behind a fog of mischaracterizations, half-truths, and a mountain of paper.

Entergy's conduct violates bedrock Commission precedent—including cases directed at Entergy itself. Its defense is built on several demonstrably false premises including EAI's assertions that (1) its safety inspection program was needed because cable operators have caused massive outages on Entergy's electric grid (they have not); (2) aerial plant clean-up can be accomplished by punitively singling out one class of attachers, cable operators, to bear the logistical and financial burdens associated with that mammoth undertaking (it cannot); (3) all of EAI's facilities were installed before cable so all spacing violations on the pole must have been created by cable (they were not); (4) every Entergy standard and

procedure is reasonable and must be complied with (they are not); and (5) that plant conditions cannot be placed into broad categories and must be resolved bolt by bolt and pole by pole (they can).

Among other allegations, Entergy argues that this audit and the plant corrections have been undertaken to benefit cable operators. But this is not true. As a result of system outages that EAI experienced during some particularly severe ice storms in 2000 and 2001, EAI proceeded with a "safety" program for the specific purpose of finding (and in many cases inventing) safety violations which then could be used as a subterfuge for forcing EAI's plant clean up costs onto cable operators. If the operator had completed its last generation of system upgrades (as Alliance, Comcast and WEHCO had done), they were to be subject to a safety audit. If they had not finished their upgrades (such as Cox) the inspection and clean-up costs were a condition and cost embedded into the upgrade. For those operators like Alliance and Comcast who dared challenge EAI and the costs and integrity of its audit, the price was a system-wide moratorium on aerial plant expansion, a permitting freeze.

Despite strong disagreements with Entergy over issues ranging from the basic design of the survey, its costs and the allocation of responsibility for corrections, Arkansas cable operators have attempted to cooperate with Entergy and its contractor USS to correct *bona fide* violations of pole plant. But this has proven to be futile. Many of the plant corrections were caused by EAI and EAI is needed to fix its own plant and/or to require the cooperation of other pole occupants.

Worse, because its own design and construction crews are so unfamiliar with, or indifferent to, the standards of the National Electrical Safety Code ("NESC"), basic electric system construction and basic principles of joint use, EAI crews continue to create new violations virtually every day. In this chaotic and often toxic environment, broadband expansion is being thwarted if not stopped outright by Entergy's unvarnished abuse of the monopoly pole resource.

For these reasons, Complainants are entitled to all relief requested in the Complaint.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	2
II. TRUTH NO. 1: COMPLAINANTS DID NOT CAUSE MASSIVE ELECTRIC OUTAGES	6
A. Entergy's "Outage Reports" Do Not Show a Connection Between Complainants' Plant and Damage to Entergy's Plant or Outages.....	7
B. Entergy Has Represented to the Arkansas Public Service Commission That Outages and Damages Were Due to Extreme Weather Conditions, Not Complainants' Facilities	15
C. Entergy Is Unable to Rebut Complainants' Claims	16
III. TRUTH NO. 2: ENTERGY CANNOT CLEAN-UP ITS PLANT BY SINGLING OUT CABLE OPERATORS	17
A. All Attaching Parties Must Participate In The Plant Clean- Up	18
B. Complainants Take Safety Seriously and Have Made Many of the Changes Entergy and USS Requested	19
C. It Is In Complainants' Best Interests To Ensure Delivery of Safe, Reliable Electricity Because They Cannot Deliver Their Services if the Poles Fail	23
D. By Singling Complainants Out, Entergy Fails To Acknowledge and Address Its Own Culpability for the Condition of Its Plant	25
1. Entergy's "safety" program discriminates against Complainants	26
2. It is unjust, and unreasonable for Entergy to disregard the parties prior practices in the field	27
E. Unauthorized attachments	32
IV. TRUTH NO. 3: COMPLAINANTS ARE NOT PRESUMED TO BE RESPONSIBLE FOR ALL VIOLATIONS BECAUSE ENTERGY'S FACILITIES WERE PLACED ON THE POLES FIRST.....	36
V. TRUTH NO. 4: ENTERGY'S REQUIREMENTS ARE UNREASONABLE, INCONSISTENT AND DISCRIMINATORY	40
A. Entergy's Application of the Code is Focused on a Game of "Gotcha" and Not Safety.....	41
B. Entergy Fundamentally Misconstrues the NESC.....	47
1. The NESC is not a "minimum standard"	47
2. The Rules Exceptions Contained In The NESC Are Critical Components To The Rules Themselves	49

3.	Entergy Misconstrues the Grandfathering Provisions of the NESC.....	50
4.	Complainants' non-conforming attachments are not necessarily "violations"	51
a)	Bonding.....	52
b)	12 inches of separation.....	53
C.	Entergy Does Not Have a Clear, Consistent Set of Standards.....	53
D.	Entergy Has Discriminated Against Complainants	56
1.	Entergy Shows Prefers Attachers That Hire USS	57
a)	Cox	57
b)	Cebridge.....	59
2.	Entergy Does Not Apply The Same Rules to Telephone Companies.....	61
VI.	TRUTH NO. 5: PLANT CONDITIONS AND CORRECTIONS CAN BE CATEGORIZED	62
VII.	TRUTH NO. 6: ENTERGY IMPOSED A PERMITTING FREEZE	64
VIII.	THE COMMISSION HAS THE AUTHORITY AND EXPERIENCE TO RENDER A DECISION IN THIS CASE	66
A.	The FCC Is Uniquely Qualified To Resolve The Complaint.....	66
B.	The Purpose and Intent of the Pole Attachment Act Was To End Utility Pole-Owner Abuse Of Monopoly-Controlled Essential Facilities	71
IX.	ENTERGY'S EVIDENCE AND AUDIT RESULTS ARE UNRELIABLE.....	73
A.	Entergy Filed Erroneous and Misleading Evidence With the Commission.....	75
B.	The Audit and Inspection Results are Unreliable and Unreasonably Costly	80
1.	USS Inspections Are Inconsistent At Best	81
2.	USS Conducts Multiple Inefficient, Unnecessary Rounds of Inspections	82
3.	Entergy's construction crews do not follow the same standards USS and Entergy's joint use department are following.....	83
4.	Complainants have no confidence in USS' and Entergy's lines of communication and recordkeeping	84
X.	ENTERGY'S AUDIT AND INSPECTION PROGRAM IS DESIGNED TO BENEFIT ENTERGY, NOT COMPLAINANTS.....	85
A.	EAI Prevented Complainants From Participating in the Audit.....	86
B.	Complainants derived no benefit from USS' services, whereas the product is very useful for Entergy	88
1.	Complainants already have accurate maps.....	88

2.	Entergy needs USS' maps to modernize its plant management records.....	89
3.	Complainants do not derive a benefit from surveys of poles owned by other utilities or poles that do not have cable television attachments	90
C.	USS Provides Minimal Services to Complainants at Maximum Costs	92
XI.	COX IS A PROPER PARTY TO THIS SUIT AND IS ENTITLED TO ALL RELIEF REQUESTED IN THE COMPLAINT.....	97
XII.	CONCLUSION	99

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

ARKANSAS CABLE
TELECOMMUNICATIONS
ASSOCIATION; COMCAST OF
ARKANSAS, INC.; BUFORD
COMMUNICATIONS I, L.P. d/b/a
ALLIANCE COMMUNICATIONS
NETWORK; WEHCO VIDEO, INC.; and
TCA CABLE PARTNERS d/b/a COX
COMMUNICATIONS,

File No. _____

Complainants

v.

ENTERGY ARKANSAS, INC.

Respondent.

To: Enforcement Bureau, Market Disputes Resolution Division

REPLY

Pursuant to Section 1.1401 *et seq.* of the Commission's Rules, 47 C.F.R.

1.1401, Complainants^{1/} submit this Reply to Entergy Arkansas, Inc.'s ("Entergy,"
"EAI" or "Respondent") Response to Complainants' Pole Attachment Complaint.

^{1/} Arkansas Cable Telecommunications Association ("Association"), Comcast of Arkansas, Inc., Buford Communications I, L.P. d/b/a Alliance Communications Network, WEHCO Video, Inc. and TCA Cable Partners d/b/a Cox Communications are collectively referred to herein as "Complainants."

I. INTRODUCTION

Although the pleadings and documents submitted in this case are voluminous, and the tangential issues introduced are diverse, essentially, Complainants bring only one issue to the Commission: are EAI's "safety" policies, procedures and charges just and reasonable. The answer is a resounding "no."

Despite the fact that Entergy attempts to sow confusion from what can be complex engineering and operational issues, no distraction is dramatic enough to alter what is at its root Entergy's unlawful conduct. Rhetoric and red herrings that attempt to portray EAI as the benevolent guardian of aerial plant safety and cable operators as safety renegades do not alter this basic truth. It takes neither a council of NESC, electric and communications industry experts, nor an extended proceeding to determine that EAI is completely out of bounds. Contrary to Entergy's assertions, Complainants do not oppose safety inspections and plant clean-up programs. Complainants, however, object to this audit and this inspection program because its effect and its design (1) bear no resemblance to the thoughtful, balanced program Entergy alleges it to be; (2) are intended to generate revenue and other benefits for both Entergy and USS at Complainants' expense; and (3) place the burden of decades of neglect on the shoulders of the Arkansas cable industry. In addition to creating an atmosphere of distrust between the parties and misplaced blame on Complainants, the program violates Commission precedent.

Entergy's and USS' audit and inspection program—and its justification for the program—is based on six false premises:

- **False Premise No. 1:** Complainants caused massive electric outages.
 Entergy apparently believes or at least hopes that its repetition of this mantra will make it come true. The evidence Entergy submitted shows no foundation or causal link supporting this specious charge.
- **False Premise No. 2:** Entergy can conduct a plant clean-up project by singling out cable operators. Complainants are willing to do their part to improve the condition of Entergy's plant. However, all attachers, including Entergy and the telephone companies, must work together, cooperatively under the same general standards. Equally important, Entergy continuously installs its new plant in an unsafe manner that threatens its own plant and public and worker safety, but makes its stated aim of compliant aerial plant impossible to achieve.
- **False Premise No. 3:** Complainants are responsible for all violations because Entergy's facilities were placed on the poles first. As explained below, as new businesses and housing developments are built, and as population densities increase, Entergy installs new equipment such as transformers, electric service drops, traffic signal power leads and street lights. In many areas, Entergy installed new equipment in areas Complainants had built-out many years previously.
- **False Premise No. 4:** Every Entergy pole attachment standard is reasonable and consistent and must be complied with. EAI insists that it should have the absolute right to impose its own engineering and

construction standards, and that those standards could exceed NESC standards. This view, however, not only conflicts with long-accepted industry practice, but is – among other things – discriminatory. On the one hand, EAI insists on super-NESC standards to apply to cable operators but on the other hand refuses to keep its own facilities in compliance with the NESC to address very serious plant conditions.

- **False Premise No. 5:** Categories of plant conditions must be addressed on a pole-by-pole, attachment-by-attachment basis. Among other things, Entergy has sought to force cable operators to secure a professional engineer's stamp for every pole that does not adhere to Entergy's "standards." As explained below, under the NESC exceptions to the general rules carry the full force and effect of the Code. Neither the Code, Arkansas state law, nor standard industry practice require this and it is unreasonable to do so.

- **False Premise No. 6:** Entergy never instituted a permitting freeze. Entergy has conditioned access to its poles on Complainants complying with the unlawful terms and conditions associated with Entergy's and USS' audit and inspection program. Whether by design or not, the effect is the same: Entergy has leveraged its status as the owner of essential facilities by blocking access to force Complainants to acquiesce to unreasonable terms.

Entergy, the Commission, and the Association have been here before.

Entergy's unlawful conduct and the false premises it uses to justify its conduct are part of a broader pattern of hostility to cable operators that emerged in Entergy's

service areas in the mid-to-late 1990s. Despite the fact that, in 1999, the Commission concluded that "Entergy cannot engage a contractor...and disregard the cost because [the cable operator] is responsible for paying it," 2/ Entergy has done exactly that again—only two years later when it hatched the audit and inspection program in 2001. In a separate order, also issued in 1999, the Commission further admonished Entergy for imposing unlawful terms on cable operator, holding that Entergy may require Complainants to pay "only the direct costs for necessary surveys actually performed." 3/ Entergy is the only party deriving a benefit, and it, not Complainants, must be responsible for its costs.

It is critical for the Commission to address Entergy's recidivism quickly and decisively and to take a zero-tolerance approach to Entergy's unlawful conduct. To that end, the Commission should send a clear message to Entergy, not only to address unlawful conduct at issue in this proceeding, but to also to put an end to Entergy's long-standing pattern of misconduct.

Complainants urge the Commission not to be distracted by the tangential issues Entergy is attempting to inject into this proceeding. Complainants are particularly concerned because Entergy, with no apparent concern about veracity or credibility, have made false or misleading allegations that either are unsupported by evidence or are supported by false or misleading evidence. Other Entergy

2/ *Cable Texas, Inc. v. Entergy Servs., Inc.*, 14 FCC Rcd. 6647, ¶ 14 (Cab. Serv. Bur. 1999).

3/ *Texas Cable & Telecom. Ass'n v. Entergy Servs., Inc.*, 14 FCC Rcd. 9138, ¶ 17 (Cab. Serv. Bur. 1999). The Arkansas Cable Telecommunications Association was also a complainant in this action.

rhetorical techniques consist of truthful statements interposed to convey misleading implications or containing egregious omissions. *The critical feature of Entergy's defense is that it presents creative excuses for its unlawful conduct, but ultimately does not deny it.* Complainants urge the Commission to adhere to its long line of precedent rejecting such conduct and justifications. Complainants urge the Commission to stay focused on the core issues before it.

Ultimately, the Commission must only determine whether Entergy's practices are just and reasonable. To do so, the Commission must craft a remedy that is in keeping with its congressional charge, its prior precedent and the specific circumstances of this case. It need not make a determination as to which party has the most violations on its plant, and it does not, as EAI repeatedly suggests, require the Commission to wade into no details of Entergy's operations.

II. TRUTH NO. 1: COMPLAINANTS DID NOT CAUSE MASSIVE ELECTRIC OUTAGES

The majority of Entergy's case rest on this False Premise No.1—that Complainants caused massive outages and damage to Entergy's plant. However, the evidence Entergy submitted in its Response does not support Entergy's theory. To the contrary, the boxes of documents actually show that only a small fraction of the incidents identified were outages and that an even smaller fraction of those incidents actually involved (as distinct from "caused by") cable operators. In the absence of evidence showing a causal link between Complainants' plant and

massive outages, Entergy's defense falls flat, meaning that Entergy is unable to rebut Complainants' allegations. ^{4/}

A. Entergy's "Outage Reports" Do Not Show a Connection Between Complainants' Plant and Damage to Entergy's Plant or Outages

Although almost inconceivable, Entergy apparently submitted the many volumes of "outage reports" without considering that Complainants and the Commission would read, understand and investigate them. These materials are a theatrical display lacking foundation, relevance or even a shred of a causal connection of Complainants to the purportedly massive electric outages cited as the "reason" for the safety regime.

Before considering the content of these materials, it is telling that Entergy provided no foundation to support these documents. Entergy does not explain how these documents were generated; how they were kept; whether the affected cable operator was contacted; or through what methodology either party concluded that Complainants were responsible. More important, Entergy never identifies how any single outage report supports its contention that Complainants caused damages or

^{4/} It is well-established by the Commission that "once a complainant in a pole attachment matter meets its burden of establishing a *prima facie* case, the respondent bears a burden to explain or defend its actions." *Marcus Cable Assocs, LP v Texas Util. Elec. Co.*, 18 FCC Rcd.15932, ¶13 (2003). Section 1.1409(b) of the Commission's rules (governing the burden of proof in pole attachment cases) is intended to follow the general proposition that the burden of proof should rest on the party going forward with an issue. *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585, ¶ 40 (1978). Therefore, once Complainants established a *prima facie* case regarding Entergy's conduct, "the respondent then carries the burden of rebutting what, without such rebuttal, would be enough to result in judgment in favor of the complainant." *Id.*

outages. The only explanation accompanying these reports are comments linemen or customers may have made in connection with the report. 5/ Comments by linemen and customers do not constitute credible and reliable evidence to support these allegations.

Second, a significant majority of the "outage reports" Entergy submitted indicated that there was never an outage or even a "blink" 6/ in the delivery of electric power. For example, Trouble Ticket 1002390688, page one, Volume 4, Exhibit 93, shows that Entergy was called because a limb fell on the service wire to the house, but that no customer ever lost power. 7/ In the summary charts Entergy provided with the documents, incidents without power outages or blinks are listed as "false" outages. 8/ True outages are incidents in which a customer actually lost power, or experienced a blink. 9/ Although Entergy submits Exhibits 90-93 as conclusive evidence that Complainants caused 4102 outages, this same

5/ See Response Exhibit 91, Index Key.

6/ A "blink" is a brief interruption in the supply of power (such as a momentary blink in the lights).

7/ Entergy misrepresents the extent of cable television involvement in this Trouble Ticket. The Trouble Ticket shows two devices affected: a transformer and cable television. However, the Summary Sheet in front of this Trouble Tickets only lists cable television as the device affected.

8/ See Summary pages, Response Exhibits 90-93; Declaration of M. Billingsley, ¶ 6; Declaration of B. Hooks, ¶ 5; Declaration of J. Gould, ¶ 6; Declaration of T. Allen, ¶ 4.

9/ See Summary pages, Response Exhibits 90-93; Billingsley Reply Decl., ¶ 6; Hooks Reply Decl., ¶ 5; Gould Reply Decl., ¶ 6; Allen Reply Decl., ¶ 4.

documentation clearly shows that only 200 actually involved outages and 151 outages involved cable facilities in some way. 10/

Third, for those 200 incidents that show an outage or blink, the “outage reports” do not show any causal connection to Complainants. In fact, in many instances, the “outage reports” have nothing at all to do with Complainants’ plant. 11/ The reason is simple. These documents, commonly referred to as “trouble tickets” or “truck roll reports” are generated each time Entergy receives a report—from customers, passersby or even from Complainants themselves 12/—about a downed line, power interruption, or some other condition that might concern an individual. 13/

For example, one ticket shows that lightning struck a transformer. 14/ There is no causal connection to cable television. On another ticket, a landlord called Entergy to complain that his neighbor, who did not have electricity had was powering his trailer home by running an extension cord from the landlord’s trailer

10/ See Summary pages, Response Exhibits 90-93; Billingsley Reply Decl., ¶ 6; Hooks Reply Decl., ¶ 5; Gould Reply Decl., ¶ 6; Allen Reply Decl., ¶ 4.

11/ See, Response Exhibits 90-93; Billingsley Reply Decl., ¶ 10; Hooks Reply Decl., ¶ 6; Gould Reply Decl., ¶ 7; Allen Reply Decl., ¶ 5.

12/ See Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91. Entergy generated these tickets when Alliance called Entergy to report that it had lost power to its power supplies. Entergy reported the cause to be “lightning.” This makes sense, as the trouble ticket also reports that there was a thunderstorm.

13/ See Response Exhibits 90-93; Billingsley Reply Decl., ¶ 8; Hooks Reply Decl., ¶ 7; Gould Reply Decl., ¶ 8; Allen Reply Decl., ¶ 6.

14/ See Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Gould Reply Decl. ¶ 9. The remarks on this Trouble Ticket state “LIGHTNING HIT & FLAMING TRANSFORMER.”

home. 15/ In fact, most of the trouble tickets include incidents unrelated to cable operators at all. 16/ Attributing incidents such as these to the Complainants subverts the truth and the Commission's processes.

Fourth, there is no evidence that Entergy or any other party was called in to investigate and determine whether any party (cable or otherwise) was at fault. 17/ Nothing suggests that the opinions expressed in the comments sections of the reports are anything more than off-the-cuff impressions. Certainly, nothing suggests that Entergy fully investigated each of these instances to determine fault. It is difficult for Complainants to defend themselves against Entergy's allegations considering that (1) for the vast majority of these incidents, Entergy never notified Complainants, and (2) conditions that may have existed at the time the reports were taken may no longer exist. 18/

Fifth, in a significant majority of the incidents, where a true outage was reported, the trouble tickets indicated that the cause of the incident was

15/ See Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response 92; Allen Reply Decl., ¶ 7. The remarks on this Trouble Ticket state "LANDLORD SAID THIS CUST [sic] HAS AN EXTENSION CARD [sic] RUNNING FROM HIS TRAILER TO THE TRAILER ACROSS THE STREET WHICH DOES NOT HAVE ELECTRICITY..WE WENTOUT [sic] THERE 11-21 & UNPLUGGED IT/CUST [sic] HAS PLUGGED IT BACK IN..." Entergy followed up with the following comments: "THIS IS CUSTOMERS RESPONSIBILITY AND NOT A CONCERN OF THE COMPANY PER NETWORK MANAGER." It is completely irresponsible for Entergy to allege this is an outage WEHCO caused.

16/ See Outage Summary Chart at p. 14, below. Billingsley Reply Decl., ¶¶ 15-16 ; Hooks Reply Decl., ¶ 6; Gould Reply Decl., ¶ 9; Allen Reply Decl., ¶ 5.

17/ None of the operators have any record of Entergy calling or reporting this volume of problems. See Billingsley Reply Decl., ¶ 9; Hooks Reply Decl., ¶ 8 ; Gould Reply Decl., ¶ 9 ; Allen Reply Decl., ¶ .

18/ See Billingsley Reply Decl., ¶ 7; Hooks Reply Decl., ¶ 8; Gould Reply Decl., ¶ 9; Allen Reply Decl., ¶ 7.

unknown. 19/ On their face, these reports rebut, not support, Entergy's claim that these tickets are "evidence" of Complainants' wrongdoing

Given that only 151 out of 4102 of these documents show actual outages somehow related to cable, and that 42 out of the 151 outage tickets state "Cause Unknown," 20/ Entergy's characterization of all of these documents as "outage reports" is a gross misrepresentation. More important, even in that small fraction of documentation where Entergy has assigned responsibility to cable on the face of the documents, there are many variables in play that may or may not mean that Complainants truly were responsible.

For example, on some of the trouble tickets, the notations indicate that a truck or other vehicle caught a cable television line. 21/ Although the cable television facilities were involved, there is no way to know who actually was responsible for the accident. At least one ticket described a dump truck driving down a street with its bed up. 22/ Cable facilities that have proper road clearances according to the NESC (or even Entergy's heightened standards) can nonetheless be

19/ See Outage Summary Chart at p. 14, below; Response Exhibits 90-93; Billingsley Reply Decl., ¶ ; Hooks Reply Decl., ¶ 8 ; Gould Reply Decl., ¶ 9; Allen Reply Decl., ¶ 7.

20/ See Outage Summary Chart at p. 14; Response Exhibits 90-93; Billingsley Reply Decl., ¶ 10; Hooks Reply Decl., ¶ 9 ; Allen Reply Decl., ¶ 8.

21/ See Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Billingsley Reply Decl., ¶ 11. The Trouble Ticket states " BACKHOE BROKE CATV GUY SLAPPING WIRES TOGETHER." It is extremely unclear from this description what happened and who was at fault.

22/ See Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92 ; Allen Reply Decl., ¶ 8. The Trouble Ticket states "dump truck with bed up hung cable TV and popped two phases together."

snagged by a truck traveling in this fashion. 23/ In these cases, it is the intervening negligence of a third party that has caused the outage.

Similarly, the trouble tickets may erroneously implicate cable television facilities, simply through human error or lack of familiarity with the facilities placed on poles. As stated above, Entergy identified linemen and customers as the source of some remarks on the trouble tickets. 24/ Customers, in particular, are not qualified to determine which company's line is implicated. In some cases, when a customer reports a downed cable line, cable service crews arrive on the scene to find that telephone or other facilities, and not cable lines, are down. 25/ Furthermore, in many areas, the telephone facilities are placed lower on the poles than cable. 26/ For example, Comcast surveyed all of the "outage reports" in Tab One, Volume One, Response Exhibit 90. 27/ On approximately one-third to one-half of the poles, telephone facilities occupied the space below Comcast. 28/ This means that where vehicles caught cable television facilities (if they did indeed catch them), they also caught telephone facilities. 29/

23/ See Allen Reply Decl., ¶ 8.

24/ See Response Exhibits 90-93, Index Key.

25/ See Billingsley Reply Decl., ¶ 12; Hooks Reply Decl., ¶ 10; Gould Reply Decl., ¶ 11; Allen Reply Decl., ¶ 9.

26/ See Report of Michael T. Harrelson, ¶ 20.

27/ See Billingsley Reply Decl., ¶ 13.

28/ See *id.*

29/ See Billingsley Reply Decl., ¶ 13. Complainants do not imply that low-hanging telephone facilities excuse cable television operators from keeping proper clearances. Rather, Complainants raise this to show how Entergy has unfairly singled out cable operators as scapegoats where other attachers have many of the same problems.

Other trouble tickets are evidence of nothing more than a report of a broken or downed cable service drop. It is not unusual for drops, which are very light weight, to break during severe weather. However, because cable drops are light and almost always *lower* on the pole than electric, a downed service drop almost never causes an interruption in electric service. 30/

There are other errors in Entergy's analysis as well. In one case, a ticket shows Complainant Alliance Communications calling Entergy to report a loss of power to one of the power supply units that powers its cable facilities. 31/ This was nothing more than a routine service call to restore power and does not indicate that Alliance was at fault. Regardless, Entergy submitted this to the Commission as evidence of a cable-caused outage. These are only a few examples. Entergy incorrectly attributes many more trouble tickets to Complainants than Complainants reasonably have the time or space to bring to the Commission's attention. 32/

Finally, Complainants have not received prior notification of most of these trouble tickets. 33/ If these outages were even arguably attributable to

30/ See Billingsley Reply Decl., ¶ 14; Hooks Reply Decl., ¶ 11; Gould Reply Decl., ¶ 12; Allen Reply Decl., ¶ 10.

31/ See Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91;

32/ Billingsley Reply Decl., ¶ 15; Hooks Reply Decl., ¶ 12; Gould Reply Decl., ¶ 9; Allen Reply Decl., ¶ 11. These include erroneously identifying Complainants as the owners of the facilities and the causes of the problems.

33/ Billingsley Reply Decl., ¶ 9; Hooks Reply Decl., ¶ 8; Gould Reply Decl., ¶ 9; Allen Reply Decl., ¶ 7.

Complainants, Complainants expect that Entergy would have notified them of the problems.

The following charts break down Entergy's analysis:

	Number of outage reports	Number of true outages	Number of true outages involving CATV	Number of true outages involving CATV stating "Inspection Unknown" or "Cause Unknown"	Number of true outages where CATV <i>might be at fault</i>	Number of true outages where CATV <i>knows to be at fault</i>
Alliance	86	6	4	2	1	2
Comcast	1491	46	39	9	34	0
Cox	800	90	41	21	33	8
WEHCO	725	58	24	10	17	6
Total	4102	200	151	42	85	16

With no investigation of the circumstances and no investigation into third-party culpability, any number of causes can combine to cause outages. It is not credible for Entergy to allege Complainants are responsible in these instances.

That said, Complainants are willing to take responsibility for those problems that their plant did indeed cause. What Entergy's reports actually show is that over the course of six years, 151 outages *may have involved* cable television, 85 *might be* attributed to cable television, but that Complainants can only verify that 16 were actually caused by cable television facilities. ^{34/} This is a far cry from the 4102 Entergy alleges. For the outages that are actually caused by cable television, this averages to be less than one per Complainant per year. The trouble tickets simply

^{34/} See Outage Summary Chart at p. 14, above; Billingsley Reply Decl., ¶ 16; Allen Reply Decl., ¶ 12.

do not provide enough information to reach the conclusion that Complainants are at fault. They are a documentary record of calls Entergy received—nothing more.

Finally, it is telling that neither of the witnesses Entergy presents as experts have opined that Complainants caused these massive outages. In contrast, Complainants' expert witness who has reviewed the trouble tickets and outage logs and interviewed Complainant witnesses unambiguously states on the record that the trouble tickets do not in anyway create a causal link between Entergy's outages and Complainants' plant. 35/

B. Entergy Has Represented to the Arkansas Public Service Commission That Outages and Damages Were Due to Extreme Weather Conditions, Not Complainants' Facilities

Analysis of Entergy's submission is not the only clue that Entergy appears to have fabricated its claims that Complainants are responsible for massive outages. In proceedings at the Arkansas Public Service Commission ("APSC") and on its own website, Entergy has repeatedly and consistently maintained that the outages associated with the 2000 and 2001 ice storms were caused by abnormally extreme weather conditions and, in particular, trees and other vegetation falling on the lines 36/ and the Arkansas Public Service Commission agreed. 37/ It is only now, in

35/ See Harrelson Reply Decl., ¶¶ 14-15.

36/ See, *Entergy System Fully Restored Ahead of Projections*, Jan. 3, 2001, <http://www.entergy-arkansas.com/AR/newsroom/newsDetail.asp?ID=112&RC=Ar&List=Region> (visited June 7, 2005) (hereinafter Jan. 3, 2001).

37/ See *In The Matter of the Annual Evaluation Reports of Entergy Arkansas, Inc. Pursuant to its Regulatory Earnings Review Tariff*, Docket Nos. 98-114 U, 01-084 U, 01-296 U, (Ark. Pub. Serv. Comm., May 17, 2002), p. 15.

connection with this Complaint proceeding that Entergy alleges Complainants caused the outages. 38/

C. Entergy Is Unable to Rebut Complainants' Claims

Without any evidence that Complainants are responsible for massive widespread outages there is no justification for engaging USS to conduct the audit and inspection at Complainants' expense. Complainants urge the Commission to see through Entergy's unsupported claims. All evidence points toward the following two conclusions: Entergy fabricated False Premise No. 1 to 1) clean up its plant at Complainants' expense and 2) shift blame for its poor plant conditions to Complainants. Indeed, as a result of state electric service rate proceedings the Arkansas Public Service Commission commenced shortly after the ice storms, Entergy faced a supposed \$3.8 million shortfall in its recovery of costs and increasing pressure from the public to improve its service reliability. 39/ It is no coincidence that Entergy hatched its scheme to force Complainants to clean up its plant and recover expenses at around this same time. Although Complainants are willing to undertake their fair share of responsibility in addressing problems with

38/ Outages caused by falling trees and by vegetation could indicate Entergy's neglect of distribution plant maintenance.

39/ See *In The Matter of the Annual Evaluation Reports of Entergy Arkansas, Inc. Pursuant to its Regulatory Earnings Review Tariff*, Docket Nos. 98-114 U, 01-084 U, 01-296 U, (Ark. Pub. Serv. Comm., May 17, 2002), p. 8; News Release, Mar. 11, 2002, <http://www.entergy-arkansas.com/AR/newsroom/newsDetail.asp?ID=334&RC=Ar&List=Region> (visited June 7, 2005); *Entergy Arkansas Says It Still Needs Surcharge*, Commercial Appeal, Oct. 26, 2001.

Entergy's plant,^{40/} the Commission must not allow Entergy to make them scapegoats for Entergy's own failings.

Thus, Entergy's supposed justification for its punitive anti-cable "safety" regime is pure fiction. Entergy has built its entire case around its mantra that Complainants caused massive outages and damage to Entergy's facilities. There is no reasonable or legitimate basis to support the ill-conceived inspection program. As discussed more fully below, Complainants derive no benefit from the inspection. ^{41/} As a result, forcing Complainants to assume the costs of USS' inspection program is an unjust and unreasonable term or condition of attachment.

III. TRUTH NO. 2: ENTERGY CANNOT CLEAN-UP ITS PLANT BY SINGLING OUT CABLE OPERATORS

Complainants summarize the importance of full cooperation and participation in plant clean-up initiatives with the expression popularized by a former Arkansan: it takes a village to maintain a pole. Each party attached to any given pole shares in the burden of keeping the pole well-maintained and up to code. It can be extremely difficult to point to any one actor as the sole cause of anything that happens on a pole. Many contributing factors go into the condition of a pole, including construction and development in the neighborhood as well as the level of communication and field relationships between the parties. Singling out Complainants as the bad actor fails to acknowledge a wide range of factors and conditions that contribute to the overall condition of Entergy's pole plant, including

^{40/} See Section III.B., below. Complainants have been working hard to make changes to its plant to conform with Entergy's new standards.

^{41/} See Section X.C., below.

Entergy's own culpability in the condition of its plant. More important, it fails to acknowledge Complainants' hard work to make changes to their facilities—even where they disagree with Entergy's and USS' requirements.

A. All Attaching Parties Must Participate In The Plant Clean-Up

Entergy's audit and inspection program was ill-conceived from the beginning. By targeting Complainants based on false charges of outages and damage to electric utility plant, Entergy violated the cardinal rule of plant overhaul—all attachers must participate in the design and execution of the project. ^{42/} A major overhaul and clean-up of plant requires the full cooperation and participation of all parties attached to the poles. The failure of even one party to cooperate fully can affect the other attachers' ability to achieve or maintain code conditions. Unfortunately, this is exactly what has happened in Arkansas.

Complainants simply cannot undertake all the actions that would be needed to clean up the pole plant alone. Many of the violations Entergy cites can only be corrected with EAI's and/or the telephone companies' participation. ^{43/} For example, Complainants are able to correct a clearance violation only if power is high enough or telephone is low enough to allow the cable operator to move up or move down to correct a violation. If this is not the case, then the correction can only be made if either the telephone company (which usually is the lowest facility on the pole) can (or will) move its equipment to a lower spot on the pole or if the power

^{42/} See Harrelson Reply Decl., ¶ 16

^{43/} See *id.*; Billingsley Reply Decl., ¶ 20; Hooks Reply Decl., ¶ 15 ; Gould Reply Decl., ¶ 16 ; Allen Reply Decl., ¶ 14 .